87-5096

No. _____

IN THE SUPHEME COURT OF THE UNITED STATES
October Term, 1987

QUINCY WEST,
Petitioner,

v.

SAMUEL ATKINS,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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July 8, 1987

QUESTIONS PRESENTED

1. Did a physician who was under contract to provide orthopedic services to inmates at a state prison hospital act under color of state law for purposes of §1983 in his treatment of a North Carolina state prison inmate?

2. Do prison physicians - whether permanent members of a state prison medical staff, or under contract with the state prison system - act under color of state law for purposes of §1983 liability in their treatment of state prison inmates?

LIST OF PARTIES

The parties to the proceedings below were the petitioner Quincy West, and defendants Samuel Atkins, Rae McNamara, and James B. Hunt. Samuel Atkins was a physician acting under contract to the North Carolina Department of Correction, Rae McNamara was the former head of the North Carolina Division of Prisons, and James B. Hunt was the former governor of North Carolina.

The district court dismissed the claims against defendants McNamara and Hunt and the court of appeals dismissed plaintiff's interlocutory appeal of that order on April 23, 1985. On September 3, 1986, a panel of the Fourth Circuit affirmed the dismissal of defendant Hunt, but vacated the dismissal of defendant McNamara.

In its en banc decision, the Fourth Circuit reaffirmed the district court's dismissals of defendants McNamara and Hunt. Petitioner does not challenge these dismissals and thus defendant Atkins is the only respondent in this petition for certiorari.

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PETITION FOR A WRIT OF CERTIORARI
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The petitioner Quincy West respectfully prays that the Supreme Court grant a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit, entered in the above-entitled proceeding on April 9, 1987.

OPINIONS BELOW

The April 9, 1987 en banc opinion of the Court of Appeals for the Fourth Circuit is reported at 815 F.2d 993, and is reprinted in the appendix hereto, p. A1-A19, infra (hereafter "App.").

The September 3, 1986 panel opinion of the Court of Appeals is reported at 799 F.2d 923. App. C1-C5. On November 12, 1986, the Court of Appeals ordered that the decision of the panel be vacated, and set the case for oral argument before the en banc court. App. B1.

The June 7, 1985 order of the United States District Court for the Eastern District of North Carolina (Boyle, Terrence W.) has not been reported. App. D1-D2.

JURISDICTION

The opinion and judgment of the United States Court of Appeals for the Fourth Circuit were issued on April 9, 1987. The jurisdiction of this Court to review the judgment of the Fourth Circuit is invoked under 28 U.S.C. §1254(1).

STATUTES INVOLVED

This case involves 42 U.S.C. §1983 and its jurisdictional counterpart, 28 U.S.C. §1343.

42 U.S.C. §1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

28 U.S.C. §1343 provides, in pertinent part:

> (a) The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:
>
> > (3) To redress the deprivation, under color of state law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;
> >
> > (4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.

STATEMENT OF THE CASE

On November 29, 1984, petitioner Quincy West a state prison inmate, filed a pro se complaint under 42 U.S.C. §1983. He claimed deliberate indifference with respect to treatment for a torn achilles tendon, which he injured while playing basketball at Odom Prison in Jackson, North Carolina, on July 30, 1983. In his Complaint, petitioner alleged that Dr. Samuel Atkins refused to perform surgery to repair the torn achilles tendon, electing instead to employ a cast to see if the torn tendon would grow

back together on its own. Petitioner also alleged that between August, 1983 and November, 1984, Dr. Atkins maintained a hostile attitude toward him, refused several times to prescribe pain medication, and continued to refuse to perform corrective surgery after months of failure of his injury to heal.

Dr. Samuel Atkins provided orthopedic services to inmates at Central Prison Hospital in Raleigh, North Carolina. He was employed pursuant to the terms of a "Contract for Professional Services," under which he was paid nearly $1,000 per week for conducting two clinics per week at Central Prison Hospital, with additional amounts up to $30,000 per year for surgery.

On June 7, 1985, the district court allowed defendant Atkins' motion for summary judgment (App. D1-D2), holding that Atkins was not acting under color of state law for purposes of §1983, in reliance on Calvert v. Sharp, 748 F.2d 861 (4th Cir. 1984), cert denied 471 U.S. 1132 (1985). Calvert v. Sharp held that a doctor who provided medical services to prisoners did not act under color of state law where he had no supervisory responsibilities, was actually employed by a professional association which contracted with the state for his services, had a substantial practice excluding his prison work, derived a large share of his income from non-prison work, and where the prisoner had an option of receiving private treatment.

At the time he ruled on the motion for summary judgment, District Court Judge Terrence W. Boyle had before him: an affidavit by Dr. Atkins stating that he made his own medical decisions according to standards established by the A.M.A.; an affidavit by the North Carolina Division of Prisons Director of Health Services, stating that Dr. Atkins was an independent contractor and not a state employee, and that he exercised his own independent medical judgment when providing medical services to inmates; and a copy of Dr. Atkins' "Contract for Professional Services," indicating that Dr. Atkins was paid nearly $1,000 per week for conducting two orthopedic clinics per week at Central Prison Hospital. There was nothing in the record which indicated

the extent of Dr. Atkins' non-prison practice or the extent to which Atkins depended upon the prison work for his livelihood. Such information was part of the "fact-bound inquiry" required by the Fourth Circuit's decision in Calvert v. Sharp.

Petitioner filed notice of appeal to the Fourth Circuit on June 17, 1985. In an order filed November 18, 1985, the Court of Appeals appointed Richard E. Giroux of North Carolina Prisoner Legal Services, Inc. to represent petitioner Quincy West.

On appeal, petitioner argued both that the facts in his case did not fit into the Calvert decision, and that Calvert was wrongly decided and should be overruled. On September 3, 1986, a panel of the Court of Appeals held that a determination of whether Dr. Atkins was deliberately indifferent to petitioner's serious medical needs should have been made before addressing the issue of whether Dr. Atkins was acting under color of state law for purposes of §1983. The grant of summary judgment to Samuel Atkins was vacated, and the case was remanded to the district court. App. C1-C5.

On November 12, 1986, the court of appeals ordered that the decision of the panel be vacated, and set the case for oral argument before the en banc court. App. B1. On April 9, 1987 the en banc court refused to overrule or distinguish Calvert v. Sharp, and held that Dr. Atkins was not acting under color of state law for purposes of §1983. App. A1-A19. The court relied on Polk County v. Dodson, 454 U.S. 312 (1981), which held that a public defender does not act under color of state law.

The en banc court dismissed as unpersuasive the several additional factors which the Calvert panel had used to reach its conclusion[1], thereby going beyond Calvert in its scope. The

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[1] The Calvert opinion discussed Polk County, but also stressed the importance of the doctor's minimal contacts with the state prison system: the fact that Dr. Sharp was a privately employed physician who treated private patients as well as inmates; the fact that he did not contract directly with the Maryland state prison system; the fact that he was not dependent on the state for funds; and the fact that the provision of medical services to Maryland inmates was not within the exclusive prerogative of the state. A Maryland statute allowed state prisoners to seek private medical treatment. There was no such possibility that petitioner could obtain private medical care at his own expense.

Fourth Circuit stated that "a professional, when acting within the bounds of traditional professional discretion and judgment, does not act under color of state law, even where . . . the professional is a full-time employee of the state." App. A4. The court then stated that "[w]here the professional is acting within the bounds of professional discretion and obligation, his independence from administrative direction is assured." App. A5. The dissenting opinion stated that "[t]he rationale employed by the West majority would preclude a §1983 action against any medical professional who has treated a prison inmate since, by virtue of the exercise of their independent, professional judgment, they could never be considered state actors - notwithstanding the holding in Estelle v. Gamble." App. A13. (Harrison L. Winter, Chief Judge, concurring and dissenting).

REASONS FOR GRANTING THE WRIT

I. THERE IS A DIRECT CONFLICT BETWEEN THE FOURTH AND ELEVENTH CIRCUITS.

With regard to the issue of whether or not a prison physician is acting under color of state law, there is an irreconcilable conflict between the Fourth and Eleventh circuits. The holding of the Fourth Circuit in this case is in direct conflict with the decisions of the Eleventh Circuit in Ort. v. Pinchback, 786 F.2d 1105 (11th Cir. 1986) and Ancata v. Prison Health Services, Inc., 769 F.2d 700 (11th Cir. 1985). In Ort v. Pinchback, the district court had dismissed claims against Dr. Pinchback, a private orthopedic surgeon, and Correctional Medical Systems, the entity that oversees Alabama prison medical services. The Eleventh Circuit held that a physician who contracts with the state to provide medical care to inmates acts under color of state law. Referring to its decision in Ancata v. Prison Health Services, the Ort opinion stated that "medical personnel need not be state employees in order that their actions

be considered state action under 42 U.S.C. §1983" and that "the employees of a private entity hired by a county to provide medical care to jail inmates acted under color of state law so as to be subject to liability under §1983." 786 F.2d at 1107. Ancata cited Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974), for the proposition that "[w]here a function which is traditionally the exclusive prerogative of the state ... is performed by a private entity, state action is present." 769 F.2d at 703.

Every other circuit which has considered the issue has concluded, at least by implication, that prison physicians act under color of state law when treating incarcerated persons.[2]

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[2] First Circuit: In Miranda v. Munoz, 770 F.2d 255 (1st Cir. 1985), the court upheld a jury verdict against a physician, who worked at a jail eight hours per week, in a §1983 action by the survivors of a 19-year-old epileptic who became critically ill as a pre-trial detainee and who died three days after being transferred to a local hospital.

Second Circuit: Todaro v. Ward, 565 F.2d 48 (2nd Cir. 1977), affirmed a district court judgment against, among others, a surgical consultant at a women's correctional facility in New York.

Third Circuit: In Norris v. Frame, 585 F.2d 1183 (3rd Cir. 1978), the court remanded a pretrial detainee's §1983 claim against, among others, a prison physician. The trial court had adopted an eighth amendment analysis to evaluate the detainee's claim; the court of appeals remanded for consideration of the claim under fourteenth amendment liberty interest grounds, but there was no question as to whether the physician was acting under color of state law.

Fifth Circuit: In Murrell v. Bennett, 615 F.2d 306 (5th Cir. 1980), a prison physician was sued by a pro se Alabama inmate for alleged failure to provide proper medical treatment. The court reversed the district court's entry of summary judgment. It was assumed that the doctor was acting under color of state law. This decision is consistent with the Fifth Circuit's earlier decision in Robinson v. Jordan, 494 F.2d 793 (5th Cir. 1974), from which Judge Winter cited extensively in his dissent in the opinion below in this case. App. A17-A18.

Sixth Circuit: Byrd v. Wilson, 701 F.2d 592 (6th Cir. 1983), was a §1983 action challenging a prison medical staff's failure to provide adequate medical care at the Kentucky State Penitentiary. The court held that dismissal of the complaint against two prison physicians and other prison personnel was clearly erroneous.

Seventh Circuit: In Duncan v. Duckworth, 644 F.2d 653 (7th Cir. 1981), a pro se civil rights action against a prison hospital administrator was allowed to proceed until the identity of the members of the medical staff who were likely responsible for the alleged delay in treatment could be designated.

In Malak v. Associated Physicians, Inc., 784 F.2d 277 (7th Cir. 1986), an emergency room physician brought a civil rights action against a public hospital and a group of private physicians that employed him, following the termination of his staff privileges. "[T]he conduct of a public hospital and its employees is clearly state action and the conduct of otherwise private entities that act jointly with them is also state action." 784 F.2d at 280.

Calvert v. Sharp has been cited only three times in published federal cases outside the Fourth Circuit, all three times in district court cases, and only once in a fact situation analogous to the case at hand.[3] The opinion below in this case has yet to be cited in a published federal court decision outside the Fourth

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Eighth Circuit: In Hall v. Ashley, 607 F.2d 789 (8th Cir. 1979), the court remanded for a new trial against an orthopedic physician who was under contract to the Arkansas Department of Correction. In footnote 2 at p. 791, the court stated "Nor does any fact issue exist regarding whether Dr. Adams was at all times acting under color of state law."

In Kelsey v. Ewing, 652 F.2d 4 (8th Cir. 1981), the defendant in a §1983 action was a physician who provided medical services at a Minnesota prison pursuant to a contract with the Minnesota Department of Correction. The court said that the district court clearly erred in dismissing Kelsey's claim.

In Mullen v. Smith, 738 F.2d 317 (8th Cir. 1984), an inmate's allegations were held to state an eighth amendment claim sufficient to survive a motion for dismissal. One of the defendants was a prison physician, Dr. Hicks.

See also Lawyer v. Kernodle, 721 F.2d 632 (8th Cir. 1983) (private physician hired by county to perform autopsies was acting under color of state law).

Ninth Circuit: In Broughton v. Cutter Laboratories, 622 F.2d 458 (9th Cir. 1980), a state prisoner brought a pro se §1983 action against, among others, two prison physicians, alleging denial of medical treatment. The court remanded to allow the prisoner to amend his complaint so as to attempt to allege facts sufficient to support an action for deliberate indifference.

See also Briley v. State of Cal., 564 F.2d 849, 853, 856 (9th Cir. 1977) (cited by Judge Winter in his dissent at App. A15) ("private" physician, "while serving as [county] medical examiner and advising at the [plea] bargaining stage, was clearly clothed with the authority of state law, satisfying the 'state action' requirement of §1983").

And in Taylor v. First Wyoming Bank, 707 F.2d 388 (9th Cir. 1983), the court held that the actions of a guardian did not constitute action under color of state law, but stated that the "case would be different if the person requiring care and attention had in effect been made a ward of the state." 707 F.2d at 390.

Tenth Circuit: In Daniels v. Gilpreath, 668 F.2d 477 (10th Cir. 1982), the court held that evidence against a state hospital psychiatrist was insufficient to meet the constitutional standard, presumably holding that the psychiatrist was acting under color of state law.

See also Milonas v. Williams, 691 F.2d 931, 939-940 (10th Cir. 1982), cert. denied, 460 U.S. 1069 (1983). The court found state action in a private school situation analogous to Rendell-Baker v. Kohn, 457 U.S. 830, in which the plaintiffs were not employees, but students. This is the result which was predicted by the dissent in Rendell-Baker when it assumed that the majority would concede that actions directly affecting the students could be treated as under color of state law since the school is fulfilling the state's obligation to those children. 457 U.S. at 851.

[3] Zingmond v. Harger, 602 F.Supp. 256 (N.D. Ind., 1985), was a §1983 action by a jail prisoner against the sheriff and the county jail alleging, among other things, improper diet and treatment for a diabetic condition. The jail physician was not sued, so the court's comment that "[a] recent and most important distinction has been drawn as to the function of independent

Circuit.

This issue will persist. In the Fourth Circuit, inmates who sue prison physicians under §1983 will have their claims dismissed pursuant to Calvert and the decision in this case; in the Eleventh Circuit, they will be allowed to proceed pursuant to Ancata and Ort. The other circuits, all of which have allowed prisoner lawsuits against prison physicians to proceed, will have to choose between the two approaches when the issue is presented squarely to them. This is an important constitutional issue which has implications more broad than the issue of whether or not a prison physician acts under color of state law, as will be discussed in the next section. The Supreme Court should hear this case to resolve the conflict between the Fourth and Eleventh Circuits and to give guidance to the rest.

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outside physicians engaged to treat inmates" was not relevant to the decision in the case. 602 F.Supp. at 260.

Nash v. Wennar, 645 F.Supp. 238 (D.Vt. 1986), is the only published federal court decision outside the Fourth Circuit which has cited Calvert in a case analogous to the case at hand. Dr. Wennar provided medical services for inmates at a Vermont state prison facility through a contract with the state. In a confusing opinion, the court found that the doctor could fairly be said to be a state actor; that Dr. Wennar, by treating plaintiff under a state contract, was helping the state to fulfill its "public function" of providing medical treatment to state prisoners; and that the provision of medical care to inmates was traditionally within the exclusive prerogative of the state. The court then stated that, although the providing of medical care to state prisoners is generally a "public function" for which the State is responsible, the doctor's alleged conduct was not "fairly attributable" to the State because the doctor worked under separate canons of professional ethics that mandated his exercise of independent judgment on behalf of his patient. This holding, that conduct satisfying the "state action" and "public function" requirements does not satisfy the requirement of action under color of state law, is in apparent conflict with the statement of the Supreme Court that "conduct satisfying the state action requirement of the Fourteenth Amendment satisfies the statutory requirements of action under color of state law . . ." Lugar v. Edmunson Oil Co., 457 U.S. 922, 935, n.18 (1982) (emphasis added).

In King v. Crisp County Hospital Authority, 652 F.Supp. 477 (M.D.Ga. 1987), the district court cited Calvert in a case in which a hospital employee had filed suit alleging that he had been terminated and retaliated against in violation of the Age Discrimination in Employment Act and in violation of his constitutional rights. The court held that a radiologist, who gave hospital administrators his opinion of the plaintiff's performance, was not a "state actor" where he was not an employee of the hospital and he did not have authority to hire or fire hospital employees.

II. THE OPINION BELOW POSES AN IMMEDIATE THREAT TO PRISONERS' RIGHTS TO NECESSARY MEDICAL CARE, AND THREATENS TO UNDERMINE OTHER CONSTITUTIONAL RIGHTS RELATING TO CONDITIONS OF CONFINEMENT

Governments have the exclusive authority to incarcerate. Concomitant with this authority is the constitutional responsibility for the care of inmates. The Supreme Court made this principle clear in Estelle v. Gamble:

> These elementary principles establish the government's obligation to provide medical care for those whom it is punishing by incarceration. An inmate must rely on prison authoritites to treat his medical needs; if the authorities fail to do so, those needs will not be met . . ."[i]t is but just that the public be required to care for the prisoner, who cannot be reason of the deprivation of his liberty, care for himself."

429 U.S. 97, 103-4 (citations omitted). If the state can avoid constitutional scrutiny regarding its obligation to provide medical care to state prisoners by delegating governmental functions to private entities, the prisoners' constitutional right to be free from deliberate indifference to serious medical needs while incarcerated could be rendered meaningless.

Under the holding of Calvert v. Sharp, a prisoner who suffers disregard for his serious medical needs at the hands of a physician under contract with the state (not technically a state employee) cannot seek redress in federal court; under the holding of this case, a fellow inmate who suffers the identical mistreatment by a state employee-physician also is foreclosed from asserting an eighth amendment claim as long as the physician is acting in his professional capacity. There is language in the opinion below, moreover, which appears to deny a prisoner's 1983 claim against even a physician who does have custodial or supervisory responsibilities[4] - where the doctor is being sued in matters relating to the exercise of his "independent professional judgment": "a professional, when acting within the bounds of traditional professional discretion and judgment, does not act

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[4] In fact, Dr. Atkins did have custodial and supervisory responsibilities - he supervised nurses and correctional health assistants while performing surgery and conducting clinics, and he had custody over prisoners who had jobs as operating room technicians and nursing assistants.

under color of state law, even where . . . the professional is a full-time employee of the state". App. A4. This negates the constitutional guarantee.

It should be remembered that these decisions do not affect ordinary malpractice actions, which must be brought in the state courts. Rather, the issue is whether a federal forum exists for cases alleging serious, intentional neglect.[5] In Estelle v. Gamble, the Supreme Court, observing that a state has an obligation to provide its prison inmates necessary medical care, held that the "deliberate indifference" of state prison personnel to an inmate's serious illness or injury constitutes cruel and unusual punishment, giving rise to a claim under 42 U.S.C. §1983. As the Court stated, "[t]his is true whether the indifference is manifested by prison doctors in their response to the prisoner's needs or by prison guards in intentionally denying or delaying access to medical care or intentionally interfering with the treatment once prescribed." Estelle, 429 U.S. at 104-05 (emphasis added) (footnotes omitted). Essentially then, the opinion below would overrule Estelle, for the defendant-physician in Estelle was the medical director of the Texas Department of Correction and also the chief medical officer of a prison hospital, but the actual complaint was premised solely on the medical treatment given. Presumably, the physician in Estelle was acting "within the bounds of professional discretion and obligation" (App. A5), when he treated his patients, even though he acted also in a custodial/supervisory capacity.[6]

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[5] N.C. Gen. Stat. §143-300.7 provides for representation by the Attorney General and protection from liability for any person who provides medical services to inmates and who is sued pursuant to the Federal Civil Rights Act of 1871. The State has informed its "contract" physicians that it will not provide representation in malpractice actions. If the opinion below is allowed to stand, the State will be free from providing representatin of any kind for its medical personnel.

[6] Estelle, at 429 U.S. 104, n.10, cites Williams v. Vincent, 508 F.2d 541 (2nd Cir. 1974) (doctor's choosing the "easier and less efficacious treatment" of throwing away the prisoner's ear and stitching the stump may be attributable to "deliberate indifference . . . rather than an exercise of professional judgment").

Historically, maintaining prison facilities has been an exclusive responsiblity of the state and federal governments. However, in recent years governments at all levels increasingly have delegated various prison services to private companies. Prior to the emergence of this practice, there was general agreement that state employees assigned to deal with prisoners acted under color of state law and were accountable in the federal courts if they violated prisoners' constitutionally protected rights. If the opinions of the Fourth Circuit are allowed to stand, the Fourth Circuit will have given the states within its jurisdiction permission to elimate federal review of conditions of confinement by simply contracting with "professionals" for various services.

The need for immediate review of the Fourth Circuit's decision in this case is underscored by the trend of states to contract out, not merely selective services,[7] but entire prison facilities to private companies. Presumably, these contractors could be deemed "professionals" with respect to their occupations. An application of the reasoning of this case to this growing practice suggests that those contractors and their employees will not be held to federal constitutional standards. A logical extension of the Fourth Circuit opinions, then, would be that a state could avoid the reach of the fourteenth amendment over any governmental function merely by "contracting" with "professionals" to administer that function. The door would be open to the wholesale evasion of fourteenth amendment rights; the state could hire private corporations to administer prison units, or even the entire prison system, and thereby avoid liability under §1983 for any violations of inmates' constitutional rights.

The state should not be permitted to avoid constitutional requirements simply by delegating its constitutional and statutory duties. "[I]f this is the basis for delimiting §1983 liability, the state will be free to contract out all services

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[7] There is only one "staff" physician employed at Central Prison Hospital which is the acute care medical facility operated by the State of North Carolina for its more than 17,500 inmates. The remainder of the physicians are "contract" physicians.

which it is constitutionally obligated to provide and leave its citizens with no means for vindication of those rights whose protection has been delegated to 'private' actors, when they have been denied. Such a result is intolerable " App. A13. (Harrison L. Winter, Chief Judge, concurring and dissenting).

III. THE OPINION BELOW IS INCONSISTENT WITH PRIOR DECISIONS OF THIS COURT

A. Polk County v. Dodson Should Not Control This Case

The Fourth Circuit's reliance on Polk County v. Dodson, 454 U.S. 312 (1981), for the proposition that a professional, when acting within the bounds of traditional professional discretion and judgment, does not act under color of state law, is misplaced. The holding of Polk County is a narrow one: "we decide only that a public defender does not act under color of state law when performing a lawyer's traditional function as counsel to a defendant in a criminal proceeding." 454 U.S. at 325 (emphasis added). There is no mention in Polk County of the possibility of application of the holding to physicians. Every mention of "independent professional judgment" refers specifically to public defenders. The canons of professional responsibility to which the Polk County opinion refers are canons of the ABA relating specifically to attorneys, not to professionals in general. Language in other Supreme Court cases indicates the narrowness of the Polk County holding. For example, referring to its decision in Polk County, this Court stated: "although state employment is generally sufficient to render the defendant a state actor under our analysis, infra, at 937, it was 'peculiarly difficult' to detect any action of the State in the circumstances of that case." Lugar v. Edmundson Oil Co., 457 U.S. 922, 935, n. 18 (1982) (emphasis added).

The opinion below dismissed petitioner's argument that a public defender's adversarial role distinguishes the public defender from a state-employed physician. The Fourth Circuit concluded that Polk County's discussion of the adversarial role merely "was the basis upon which the Supreme Court concluded that

a professional may act without color of state law even when he is a full-time employee." App. A5. There is nothing in the Polk County opinion to support, or even suggest, this conclusion. There is no discussion in Polk County v. Dodson of the differences between part-time and full-time employees. In fact, the words "full-time" appear only in an introductory paragraph in the first page of the opinion. Polk County concluded that a public defender acts without color of state law because the role of the public defender is adversarial to the interest of the state. The adversarial relationship was the basis for the decision in Polk County, 454 U.S. at 320-22; it was not, as the Fourth Circuit assumed, merely a way to conclude that a "professional may act without color of state law even when he is a full-time employee." App. A5.

The limitation of §1983 liability established on behalf of public defenders by Polk County should not apply to prison doctors. Polk County, in fact, used O'Connor v. Donaldson, 422 U.S. 563 (1975), and Estelle v. Gamble, 429 U.S. 97 (1976) to distinguish public defenders from physicians and to emphasize the adversarial nature of the public defender's role. "Institutional physicians assume an obligation to the mission that the State, through the institution, attempts to achieve." Polk County, 454 U.S. at 320.

The Fourth Circuit's statement in the opinion below that "[w]here a professional is acting within the bounds of professional discretion and obligation, his independence from administrative discretion is assured" (App. A5), disregards not only the above statement from Polk County, but also the American Medical Association Standards for Health Services in Prisons (1979). The A.M.A.'s Standards suggest that physicians who treat inmates work closely with the state prison: "The health service program must function as part of the overall institutional program. The Standards call for close cooperation and coordination between the medical staff, other professional staff, correctional personnel and facility administration." Preface at

i. The opinion below also failed to consider the A.M.A.'s elaboration of Standard 102 which reiterates the dual loyalties a prison doctor owes both to the state and the inmate: "The provision of health care is a joint effort of administrators and health care providers and can be achieved only through mutual trust and cooperation." Standard 102 and Discussion.

It is true that the Polk County opinion points out that O'Connor involved claims against a psychiatrist who served as the superintendent at a State mental hospital, and that Estelle involved a physician who was the medical director of the Texas Department of Correction and also the chief medical officer of a prison hospital. However, Estelle did not turn on the supervisory role of the doctor there; the complaint was premised solely on the medical treatment given.[8] "The Polk Court discussed the custodial and supervisory functions of the doctors in Estelle and O'Connor simply in order to highlight the cooperative relationship between the doctors and the state and thus the absence of an adversarial relationship akin to that existing between public defenders and the state." App. A11-A12. (Harrison L. Winter, Chief Judge, concurring and dissenting).

The "fact bound inquiry" requirement of Calvert v. Sharp, 748 F.2d at 862, and Lugar v. Edmundson Oil Co., 457 U.S. 1939, was ignored by the Fourth Circuit in the opinion below. In order to achieve its result, the Calvert panel had used the "fact bound inquiry" approach to arrive at several narrow reasons to substantiate the finding that Dr. Sharp was not acting under color of state law. When presented with a different fact situation, the Fourth Circuit made Polk County's "independent, professional judgment" the sole basis for its holding, thereby

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[8] See Estelle, 429 U.S. at 103; id. at 104, n.10 (citing with approval several court of appeals decisions upholding claims of deliberate indifference without any mention of supervisory and custodial duties). See also Polk County, 454 U.S. at 331 (Blackmun J., dissenting) (noting that claims in Estelle and O'Connor were unrelated to the custodial and supervisory functions of the doctors there).

broadening the impact of the already incorrect decision in Calvert v. Sharp. This approach is an incorrect aberration which stands alone and apart from the other circuits.

B. Calvert v. Sharp, Which The Fourth Circuit Upheld In This Case, Was Decided Wrongly.

As the dissenting opinion in this case concluded, Calvert v. Sharp was decided wrongly, and should have been overruled. Calvert was flawed not only because it relied on Polk County but also because it used the wrong standard to determine "state action." Calvert failed to recognize that a prison doctor, even a private doctor working under a contract, is performing a state function in providing medical services to prisoners, a function which is the exclusive perogative of the State.

Calvert improperly relied on Rendell-Baker v. Kohn, 457 U.S. 830 (1982), which used the "nexus" test of Jackson v. Metropolitan Edison Co., 419 U.S. 345, 351 (1974). Reliance on Rendell-Baker was misplaced because that case involved a private school on private property; the nexus analysis is inappropriate where the defendant acts on behalf of a state instrumentality such as a unit of the state prison system.[9] The Fourth Circuit panel in Calvert v. Sharp adopted and misapplied the nexus standard. Instead of determining, first, whether the employer was governmental or private and, if private, then applying the nexus test to determine if nonetheless its agents were engaged in state action, the court applied the nexus test to answer the first question. This was incorrect. In Calvert, the employer was governmental, not private, and the court was wrong in looking to the "functions" of a "private physician. 748 F.2d 861. The Burton test should have applied because of the extent and the nature of the overall relationship between the state agency and the "private" enterprise. Burton v. Wilmington Parking

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[9] The dissent in Rendell-Baker stressed that the majority focused on the fact that the actions at issue were personnel decisions, and stated that the majority apparently would concede that actions directly affecting the students could be treated as under color of state law since the school is fulfilling the state's obligations to those children. 457 U.S. 851.

Authority, 365 U.S. 715 (1961). In the prison context, that relationship is dominated by the state's constitutional and statutory responsibility to provide health care to its prisoners.

The correct approach, taken by the Eleventh Circuit in Ancata v. Prison Health Services and Ort v. Pinchback, also has been used by district courts in other circuits in analogous contexts:

> Whether a physician is directly on the state payroll, as in O'Connor, or paid indirectly by contract, the dispositive issue concerns the trilateral relationship among the state, the private defendant, and the plaintiff. Because the state bore an affirmative obligation to provide adequate medical care to plaintiff, because the state delegated that function to the Shriver Center, and because Shriver voluntarily assumed that obligation by contract, Shriver must be considered to have acted under color of law, and its acts and omissions must be considered actions of the state. For if Shriver were not held so responsible, the state could avoid its constitutional obligations simply by delegating governmental functions to private entities.
>
> Such a treatment of "private" parties as the functional equivalents of state actors is not unprecedented in other contexts. The general principle that private entities act under color of law only if their actions are compelled by rules of decisions imposed by the state also does not apply when such private parties perform functions which are traditionally the exclusive province of the state.

Lombard v. Eunice Kennedy Shriver Center, 556 F.Supp. 677, 680 (D.Mass. 1983);

> Supreme Court decisions suggest that it is exclusively the state's prerogative to confine an individual involuntarily to a mental hospital. ... In addition, while St. Mary is correct in arguing that the provision of medical care is not traditionally dependent on state authority, see Polk County v. Dodson...., more is involved when an individual is involuntarily confined for mental health reasons.
>
> Moreover, once the state curtails an individual's liberty through the civil commitment process, it assumes affirmative obligations, imposed by the Constitution, for the individual's care and well-being.... If the state chooses to delegate these responsibilities, and a private hospital chooses to assume them, neither can then argue that the private hospital's acts and omissions do not occur under the color of state law. ...To hold otherwise would allow the state to avoid its constitutional obligations simply by delegating to private hospitals its responsibility for the care of individuals it involuntarily confines....

Davenport v. Saint Mary Hospital, 633 F.Supp. 1228, 1234 (E.D.Pa. 1986).

Action under color of state law should be found if an otherwise private party performs a function that has been "traditionally the exclusive prerogative of the State." Blum v. Yaretzky, 457 U.S. 991 (1982). The Calvert panel answered the "public function" argument primarily by stressing that Maryland law allows inmates to go outside the prison system to obtain medical care of their choice. However, North Carolina law bars all but minimum security prisoners (which petitioner is not) from exercising such an option. If there was any uncertainty in Calvert that medical care for state prisoners was exclusively within the state's control, such uncertainty is not present in the case at hand. Yet the Fourth Circuit continues to assert, at App. A6, that provision of medical services to inmates is not within the exclusive prerogative of the state. That observation is incorrect in the prison context, where the state has complete control over the circumstances and sources of a prisoner's medical treatment. The state is responsible for attending to inmate medical needs. The provision of medical treatment to inmates, therefore, is a function which is traditionally the exclusive prerogative of the state. A physician who provides such medical treatment to inmates acts under color of state law.

CONCLUSION

For these various reasons, this petition for certiorari should be granted.

Respectfully submitted,

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PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 85-6483 815 F.2d 993

Quincy West,

Appellant,

versus,

Samuel Atkins; Rae McNamara;
James B. Hunt,

Appellees.

Appeal from the United States District Court for the Eastern District of North Carolina, at Raleigh. Terrence W. Boyle, District Judge. (CA 84-1346-CRT).

Argued: December 8, 1986 Decided: April 9, 1987

Before WINTER, Chief Judge RUSSELL, WIDENER, HALL, PHILLIPS, SPROUSE, ERVIN, CHAPMAN, WILKINSON and WILKINS Circuit Judges, sitting en banc.

Richard E. Giroux, North Carolina Prisoner Legal Services, Inc. on brief for appellant; Jacob L. Safron, Special Deputy Attorney General (Lacy H. Thornburg, Attorney General on brief) for appellee.

CHAPMAN, Circuit Judge:

In Calvert v. Sharp, 748 F.2d 861, 863 (4th Cir. 1984), cert. denied, 471 U.S. 1132 (1985), we held that "[t]he professional obligations and functions of a private physician establish that such a physician does not act under color of state law when providing medical services to an inmate." Prisoner West brought this § 1983 action against a private physician who was under contract for part-time employment with the state to provide two orthopedic clinics per week at North Carolina Central Prison Hospital. Because we perceive no valid reason to overrule or distinguish Calvert, we affirm the district court's dismissal of the appellant's claim.

I.

West tore the Achilles tendon in his left leg while playing basketball on July 30, 1983. Dr. Atkins examined West and concluded that surgery could be avoided if the tendon would grow back together by itself. Atkins therefore placed West's leg in a cast and prescribed medication. West has alleged that the attention given to his injured leg was so inadequate as to be actionable under 42 U S.C. § 1983.

North Carolina Central Prison Hospital, where West is imprisoned, has one full-time staff doctor, with additional medical services provided under "contracts for professional services" with area doctors. Dr. Atkins, by contract, conducted two clinics per week at the prison. Atkins also maintained a private practice. It does appear that, because West is a prisoner in "close custody," he is not free to seek outside medical assistance.

West's § 1983 theory alleged a denial of his right to be free from cruel and unusual punishment, as defined by the Eighth Amendment. West sought compensatory and punitive damages from Dr. Atkins, compensatory and punitive damages from Rae McNamara, Director of the Division of Prisons of the North Carolina Department of Corrections, and a declaratory judgment against James B. Hunt, Governor of the State of North Carolina.

II.

The Supreme Court held in Estelle v. Gamble, 429 U.S. 97 (1976), that the deliberate indifference by a state to the serious medical needs of an inmate is a violation of the Eighth Amendment and can support a § 1983 action. To establish a § 1983 claim, a plaintiff must also show that the defendant acted under color of state law, an element which was not in issue in Estelle. The Supreme Court addressed the requirements for establishing that a defendant, who is a professional, acted under color of state law in the case of Polk County v. Dodson, 454 U.S. 312 (1981). Dodson held that "a public defender does not act under color of state law when performing a lawyer's traditional functions as counsel to a defendant in a criminal proceeding." Id. at 325 (footnote omitted). Instead, "[h]eld to the same standards of competence and integrity as a private lawyer, . . . a public defender works under canons of professional responsibility that mandate his exercise of independent judgment on behalf of the client." Id. at 321. The court noted, moreover, that "[b]ecause of their custodial and supervisory functions, the state-employed doctors in [O'Connor v. Donaldson,

422 U.S. 563 (1975)] and Estelle faced their employer in a very different posture than does a public defender." Dodson at 320. Thus the clear and practicable principle enunciated by the Supreme Court, and followed in Calvert, is that a professional, when acting within the bounds of traditional professional discretion and judgment, does not act under color of state law, even where, as in Dodson, the professional is a full-time employee of the state.[1] Where the professional exercises custodial or supervisory authority, which is to say that he is not acting in his professional capacity, then a § 1983 claim can be established, provided the requisite nexus to the state is proved.

In Calvert an inmate sued a private orthopedic specialist for an alleged failure to treat. The defendant was employed by a non-profit professional corporation, which in turn contracted with the state. We held that because private physicians exercise independent, professional judgment and render medical care in accordance with professional obligations, a physician when rendering such medical services does not act under

[1] Dodson held that the employment relationship is only a "relevant factor" in determining whether the professional acted under color of state law. The primary consideration, established in Dodson, is the defendant's "function." Thus, the plaintiff would have to prove that the employment relationship created such an overbearing environment that the exercise of the independent professional judgment, the primary test, was impossible. The simple allegation of a close employment relationship between the state and the professional, absent any proof that that relationship had the effect of precluding independent judgment, is insufficient to satisfy the "color of state law" element of a § 1983 claim. The employment relationship is but one factor in determining whether the professional exercised independent judgment.

color of state law. The defendant in Calvert had no supervisory or custodial functions.

We find the reasoning suggested by the appellant to differentiate the rule in Dodson from that enunciated in Calvert unpersuasive. Although the opinion in Dodson does point out that a public defender in effect plays a role adversarial to the interests of the state, that reasoning was the basis upon which the Supreme Court concluded that a professional may act without color of state law even when he is a full-time employee. In other words, even a full-time employee who is a professional can act without color of state law where his role in essence is adversarial to the interests of the state. Thus, "a public defender is not amenable to administrative direction in the same sense as other employees of the State." Dodson at 321. We do not need to address the problematic issue of whether the nature of the doctor-patient relationship can at times be adverse to the interests of the state. Where the professional is acting within the bounds of professional discretion and obligation, his independence from administrative direction is assured.

The appellant is probably correct in his argument that the rule enunciated in Dodson, and followed in Calvert, has the effect of limiting the range of professionals subject to an Estelle action. This effect, however, is entirely consonant with the requirements of § 1983, which statute subjects the individual to liability only where he has acted under color of state law in violating a constitutional right. In any event, it is not for

this court to tamper with the limitation of § 1983 liability established in Dodson. We therefore decline to overrule Calvert v. Sharp.[2]

III.

The appellant suggests that should this court decline to overrule its prior decision, we should distinguish it. We decline to do so. The fact that the doctor in Calvert was employed by a professional corporation, which in turn had contracted with the state, whereas Dr. Atkins, a sole practitioner, entered into that contract himself, makes no difference. A professional exercises his professional discretion pursuant to his professional obligations whether he practices alone or in a group. The effect of adopting the distinction suggested by the appellant would be to absolve one professional from liability concerning the same course of conduct and wilful failure to treat undertaken by another professional simply on the grounds that the former had associated himself with a group practice. Liability for a constitutional violation arising from a wrong done to an inmate should not rest on the contractual arrangement entered into by the putative defendant with third parties. The effect of such a rule would be to discourage any professional not associated with a group practice from serving the medical needs of prisoners. Such a rule would have the

[2] We also reject appellant's contention that the provision of medical services to the inmates is an "exclusive state function." Decisions made in the day-to-day rendering of medical services by a physician are not the kind of decisions traditionally and exclusively made by the sovereign for and on behalf of the public. See Blum v. Yaretsky, 457 U.S. 991, 1012 (1982).

deleterious effect of increasing the cost and reducing the availability of medical services for prisons.

The other grounds of distinction proffered by the appellant are equally unpersuasive.

IV.

We find no reason to disturb the district court's dismissal of the appellant's claims against appellees McNamara and Hunt. Pursuant to 28 U.S.C. § 1915(d), claims made by pro se litigants can be dismissed if frivolous: that is, if "it appears 'beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'" Boyce v. Alizaduh, 595 F.2d 948, 951 (4th Cir. 1979), quoting Haines v. Kerner, 404 U.S. 519, 520-21 (1972).

Respondeat superior is not available for § 1983 actions, and so the appellant must allege personal involvement by appellees Hunt and McNamara in the deprivation of his constitutional rights. Because the alleged deprivation of constitutional rights in this case involved the alleged failure to render medical services properly, the "personal involvement" of these appellees must be relevant to the alleged deprivation. The appellant has alleged no facts which would show that appellees McNamara or Hunt had the authority to overrule the

medical judgment of Dr. Atkins. The fact that the appellant had mailed to appellee McNamara two letters complaining about Dr. Atkins' treatment does not suffice to render McNamara liable for Atkins' medical judgments. We therefore affirm the district court's dismissal of these claims.

AFFIRMED.

WINTER, Chief Judge, concurring and dissenting:

When the panel heard this appeal, it could not, under our established practice, question the correctness of the holding in Calvert v. Sharp, 748 F.2d 861 (4 Cir. 1984), cert. denied, 471 U.S. 1132 (1985). At most, it could seek to distinguish Calvert, if a reasonable basis for distinction could be developed, or it could conclude that the correctness of Calvert was not presented because the physician who treated West was not guilty of deliberate indifference to West's serious medical needs. The panel opinion, in which I joined, pursued much the latter course. It sought to have the district court determine whether the physician was chargeable with deliberate indifference so that the necessity of addressing the correctness or distinguishability of Calvert could be certain.

An in banc court possesses greater authority. It is free to re-examine the correctness of the court's precedents and to overrule them if it determines that they were incorrectly decided. As a member of the in banc court, I am of the view that Calvert is an aberration and that it should be overruled. Alternatively, I think that Calvert should be confined to its facts and that this case is sufficiently different so as to render Calvert inapplicable.

I would therefore reverse the summary judgment in favor of Dr. Atkins, and I respectfully dissent from the majority's contrary decision. I concur, however, in affirming the dismissal of

the action against McNamara and Hunt.[1]

I.

There are several grounds for concluding that services rendered by prison doctors -- whether permanent members of a prison medical staff, or under limited contract with the prison -- constitute action "under color" of state law, for purposes of § 1983, and that, as a consequence, Calvert was wrongly decided.

A. Prison doctors are state actors

Without doubt such state employees as prison guards and wardens are "state actors" subject to § 1983 liability. Moreover, the panel in Calvert implicitly conceded that a doctor who is (1) permanently employed on the medical staff of a prison, and (2) who has "custodial and supervisory duties" acts "under color of state law" when treating prisoners. The question then becomes whether the absence of either of these factors requires a different conclusion. I think not.

All employment relationships are regulated by contract. The fact that the contractual arrangement between Dr. Atkins and the prison does not require Dr. Atkins to work exclusively for the prison should not strip his conduct of its essentially governmental nature when he is performing such service. Indeed, as the majority opinion notes, "[l]iability for a constitutional violation arising from a wrong done to an inmate should not rest on

[1] The record contains no evidence that Hunt had notice of West's complaints and, in my view, such evidence is so scant as to McNamara's notice that I perceive no basis on which to hold them liable. Of course, § 1983 does not recognize liability under the

the contractual arrangement entered into by the putative defendant with third parties." Ante at 6.

The absence of custodial and supervisory functions is equally irrelevant to the state action issue. Although the Supreme Court, in Polk County v. Dodson, 454 U.S. 312, 319-21 (1981), invoked this factor to contrast the role of the public defender in Polk with that of the doctors in Estelle v. Gamble, 429 U.S. 97 (1976) and O'Connor v. Donaldson, 422 U.S. 563 (1975), I think that the Calvert panel misapplied this discussion in Polk. Estelle did not turn on the supervisory role of the doctor there; the complaint was premised solely on the medical treatment given. See Estelle, 429 U.S. at 103; id. at 104, n.10 (citing with approval several court of appeals decisions upholding claims of deliberate indifference without any mention of supervisory and custodial duties). See also Polk, 454 U.S. at 331 (Blackmun J., dissenting) (noting that claims in Estelle and O'Connor were unrelated to the custodial and supervisory functions of the doctors there). I think it clear that Polk turned on the inherently adversarial relationship between public defenders and the state. 454 U.S. at 320-22.[2] The Polk Court discussed the custodial and supervisory functions of the doctors in Estelle and O'Connor simply in order to highlight the cooperative relation-

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[1] Cont. doctrine of respondeat superior.

[2] Although Calvert asserts that "[t]he loyalty owed by Dr. Sharp was potentially adverse to the interests of the state," 748 F.2d at 863, no basis for this speculation is offered, nor does one readily spring to mind.

ship between the doctors and the state and thus the absence of an adversarial relationship akin to that existing between public defenders and the state. There is no suggestion that performance of custodial and supervisory duties is a prerequisite for a finding that doctors act under color of state law. Indeed, such a requirement would bar many deliberate indifference claims: it seems unlikely that those with supervisory and custodial functions will often be directly involved with patient care, yet § 1983 is not available for claims based on the principle of respondeat superior.

There is no significant difference between the doctor-employees in Estelle and O'Connor, and Drs. Atkins and Sharp. While Dr. Sharp had a contract with a professional association which, in turn, had a contract with the state, it is fair to say that each of these doctors worked under contract with the state, received payment from state funds, were subject to regulation by state and professional review boards, and performed services that the state is obligated to provide to prison inmates.

The majority's assertion in this case, that where a "professional is acting within the bounds of professional discretion and obligation, his independence from administrative direction is assured" (ante at 5), is supported by nothing in the record, and completely disregards the American Medical Association Standards for Health Services in Prisons (1979), that prescribe the relationship between medical personnel and other prison officials as one of "close cooperation and coordination"; a "joint effort."

Preface at i; Std. 102 & Discussion. The rationale employed by the majority would preclude a § 1983 action against any medical professional who has treated a prison inmate since, by virtue of the exercise of their 'independent professional' judgment, they could never be considered state actors -- notwithstanding the holding in Estelle v. Gamble.

Defendants' brief argues that contractual medical service providers are "independent contractors rather than . . . employees," noting that no social security taxes are withheld from their paychecks and they receive no benefits enjoyed by state employees. But if this is the basis for delimiting § 1983 liability, the state will be free to contract out all services which it is constitutionally obligated to provide and leave its citizens with no means for vindication of those rights, whose protection has been delegated to "private" actors, when they have been denied. Such a result is intolerable.

B. "Public Function" Rationale

Action "under color" of state law will be found if an otherwise private party performs a function that has been "traditionally the exclusive prerogative of the State." Blum v. Yaretzky, 457 U.S. 991, 1011 (1982). The incarceration of convicted criminals surely falls within that category. And because "[a]n inmate must rely on prison authorities to treat his medical needs. . . [it is] the government's obligation to provide medical care for those whom it is punishing by incarceration . . . . '[I]t is but just that the public be required to care for the prisoner, who

cannot by reason of the deprivation of his liberty, care for himself.'" Estelle, 429 U.S. at 103-04 (emphasis added) (citations omitted). Accord Bowring v. Godwin, 551 F.2d 44, 46-47 (4 Cir. 1977).

The panel in Calvert, 748 F.2d at 864, and the majority opinion here, ante at 6 n.2, asserted that medical care is not within the exclusive prerogative of the state. That observation, however, is incorrect in the prison context, where the state has complete control over the circumstances and sources of a prisoner's medical treatment.[1] The view espoused here has been explicitly endorsed in other cases where the doctor operates under contract to the state. A good example is Ort v. Pinchback, 786 F.2d 1105, 1107 (11 Cir. 1986):

> . . . we hold that the district court erred as a matter of law in concluding that a physician who contracts with the state to provide medical care to inmates does not act under color of state law. In Ancata v. Prison Health Services, Inc., 769 F.2d 700 (11th Cir. 1985), we pointed out that medical personnel need not be state employees in order that their actions be considered state action under 42 U.S.C. § 1983. We held that the employees of a private entity hired by a county to provide medical care to jail inmates acted under color of state law so as to be subject to liability under § 1983. Id. at 703. Dr. Pinchback similarly performed "a function which is traditionally the exclusive prerogative of the state" when he took over the state's responsibility for attending to inmate medical needs. Id.; see Morrison v. Washington County, Ala., 700 F.2d 678, 683 (11th Cir. 1983).

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1 Although in Calvert, and unlike the situation in this case, the prisoners were allowed to go outside the prison to a doctor of their choice, this privilege was available only by virtue of a state statute. 748 F.2d at 864.

See also Hall v. Ashley, 607 F.2d 789 (8 Cir. 1979) (upholding § 1983 deliberate indifference action against orthopedic surgeon operating under contract to prison). Cf. Briley v. State of Cal., 564 F.2d 849, 853, 856 (9 Cir. 1977) ("private" physician, "while serving as [county] medical examiner and advising at the [plea] bargaining stage, was clearly clothed with the authority of state law, satisfying the 'state action' requirement of § 1983").

C. "Joint Action" Rationale

"It is enough that [a private party] is a willful participant in joint activity with the State or its agents" to render him liable under § 1983. United States v. Price, 383 U.S. 787, 794 (1966). Accord Lugar v. Edmondson Oil Co., 457 U.S. 922, 931-32 (1982). Thus, even if we assume that the doctor is not a public employee, the integral role that he plays within the prison medical system nevertheless qualifies his actions therein as "under color" of state law. The AMA Standards for Health Services in Prisons, described supra, provide that medical personnel and other prison officials are to operate in "close cooperation and coordination" with each other, in a "joint effort." There is no reason to believe that this mandate applies differently depending on the nature of the employment contract between doctor and prison.

It is significant to note that the Supreme Court in Polk recognized the viability of the joint participation rationale, but found it inapplicable to the adversarial relationship between

the state and the public defender in that case. 454 U.S. at 322 n.12. More significant is the subsequent decision in Tower v. Glover, 467 U.S. 914 (1984), where the Court held that even a public defender acts under color of state law when he conspires with state officials to deprive another of constitutional rights. The same principle holds for prison doctors.

D. Impact of relationship with the state

Critical to Calvert's conclusion that the doctor did not act under color of state law was the panel's repeated assertion that the doctor-patient relationship was in no way changed by virtue of the doctor's employment by the state. 748 F.2d at 863-64. From this the panel concluded that the doctor was an independent actor, rather than a true agent of the state. However, this position ignores the AMA standards cited supra, which dictate close cooperation between the doctor and other state officials. Conversely, to the extent that Calvert is correct in its description of the ethical obligations of physicians, 748 F.2d at 863, these obligations would be the same for the medical decisions of the staff doctors in Estelle and O'Connor, who are acknowledged to act under color of state law.

Thus I conclude that Calvert is fatally flawed. It should not be followed here. Indeed, it should be overruled. Consistent with Estelle and O'Connor, Dr. Atkins should be found to have acted under color of state law in providing medical care to West.

II.

Even if my rejection of Calvert is not well-founded, I do not believe that decision controls the outcome here. I perceive the following valid bases for distinguishing this case from Calvert:

A. Absence of prisoner-patient choice of doctor/medical care

Although it argued that diagnosis and treatment are not the exclusive prerogative of the state, the Calvert panel answered the "public function" argument primarily by stressing that Maryland law allows inmates to go outside the prison and obtain medical care of their choice. In this case, however, North Carolina law bars all but minimum security prisoners (which West is not) from exercising such an option. West was thus totally dependent on the state's chosen medical care providers; for West, that meant Dr. Atkins. If there was any uncertainty in Calvert that the medical care received by that plaintiff was exclusively within the state's control, such uncertainty is not present in this case. Dr. Atkins was chosen by North Carolina to fulfill the state's constitutional obligation to provide inmates like West with adequate medical care. North Carolina should not be permitted to plead a lack of responsibility because it delegated the task to a "private" party.

The Fifth Circuit adopted this view in Robinson v. Jordan, 494 F.2d 793, 794-95 (5 Cir. 1974):

> The trial judge alternatively stated: "It additionally appears that a doctor hired to treat prisoners is not acting under color of state law . . . . This holding was erroneous since Dr. Gates acted solely in his official capacity as a county health officer in treating appellant. This was state action . . . . Dr. Gates was not acting as a private physician but treated Robinson at the Sheriff's request because of his official employment.
>
> The cases relied on by the district judge holding that suits may not be maintained under Section 1983 against privately retained attorneys or court-appointed attorneys are inapposite. Robinson's detention prevented his seeking a physician of his choice. He did not enjoy the option of dismissing his doctor and securing another such as that open to a client dissatisfied with an attorney, appointed or retained. He was required to depend totally upon Dr. Gates, the county physician. (citations omitted)

B. Dependence on the state

Although Calvert found Dr. Sharp to have abundant non-state resources, 748 F.2d at 863, it appears (although the record is too sparse to be certain) that Dr. Atkins was heavily dependent on state funds. Moreover, it seems that Dr. Atkins' private practice, outside the prison, was significantly more limited than Dr. Sharp's. The risk that Dr. Atkins would feel compelled to adapt his medical judgments to accommodate his state employer, in conformity with the AMA's mandate to cooperate with the state, is far greater in these circumstances.

C. Absence of an intermediary

Dr. Atkins was employed directly by the state, much as any other state employee, including the doctors in Estelle and O'Connor. Dr. Sharp, however, was employed by a private association, which in turn was under contract to the state -- a factor emphasized in Calvert, 748 F.2d at 863. The presence of the

intermediary in Calvert helped to insulate Dr. Sharp from state administrative influence and pressure -- a buffer unavailable to Dr. Atkins in this case.

These considerations serve to distinguish Calvert and to limit it to its discrete facts. If Calvert is not to be overruled, and it is my preference to do so, I think that it should be so limited.

For these reasons, I would reverse the summary judgment for Dr. Atkins that was granted by the district court and remand the case for further proceedings. In short, I would hold that Dr. Atkins acted under color of state law in treating West, and I would direct the district court to determine if Dr. Atkins is chargeable with deliberate indifference to West's medical needs.

Judge Phillips and Judge Ervin authorize me to say that they join in this opinion.